

Refugee Rights and Realities

Evolving International Concepts and Regimes

edited by

Frances Nicholson

and

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1 The refugee definition as law: issues of interpretation

*Daniel J. Steinbock*¹

Which foreign victims of oppression or hardship in their homelands should we shelter? For the last forty years the world's basic answer has been: those outside their country with a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Developed in the years immediately following the Second World War and first embodied in the 1951 Convention Relating to the Status of Refugees,² this definition of a 'refugee' has formed the cornerstone of the international response to forced migration for the past four decades.³ Now adhered to – at least formally – by 133 nations, the Convention definition is one of the most widely accepted international norms, and probably one of the very few to have penetrated the public consciousness. Though the Convention and its 1967 Protocol⁴ do not so require, it has inspired many states to employ the definition in their domestic asylum systems.⁵

¹ A longer version of this chapter was originally published in 45 *UCLA Law Review*, 1998, p. 733.

² Convention Relating to the Status of Refugees, 189 UNTS 137 (hereinafter the Geneva Convention), article 1(A)(2). The entire paragraph of the Convention definition reads:

Article 1. Definition of the term 'Refugee'

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . .

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . .

Parties to the Protocol Relating to the Status of Refugees (see note 4 below) agree to the omission of the words 'as a result of events occurring before 1 January 1951' and the words 'as a result of such events'.

³ Ivor Jackson, 'The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection', 3 *International Journal of Refugee Law*, 1991, p. 403.

⁴ Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (hereinafter the 1967 Protocol).

⁵ James C. Hathaway, 'A Reconsideration of the Underlying Premises of Refugee Law', 31

Coupled in international law with the protection against *refoulement*, or return, to the country of persecution,⁶ satisfaction of the refugee definition has been the salvation of millions of people compelled, often in the most dire circumstances, to flee their native lands. The refugee definition and the instruments in which it is contained, conceived in a desire to avoid repetition of the worst excesses of the Second World War era, have added a substantial measure of humanity to the post-war period. Indeed, by providing tangible redress from certain basic human rights violations, the Convention and its Protocol can be seen as two of the foremost international human rights instruments.

As a result of its great practical impact, virtually every word of the core phrase of the refugee definition has been subject to interpretative dispute. Some aspects of the definition have acquired a fairly well-settled gloss. The meaning of 'well-founded fear' of persecution, for example, has been decided by the highest courts of the United States, the United Kingdom and other states, and these decisions and their aftermath have been widely accepted as a fair resolution of the issue of the necessary likelihood of persecution. The central question of what it means to be persecuted 'for reasons of race, religion, nationality, membership in a particular social group, or political opinion' remains, however, a contested one. What does it mean to be 'persecuted' and that the persecution be 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'?

This chapter explores the manner in which the Convention definition has been, and ought to be, interpreted. Applying traditional methods of treaty and statutory interpretation, the chapter first examines briefly the textual meaning and the drafting history of the refugee definition. Purely textual approaches employed in some states have had unanticipated effects, with both restrictive and expansive results. As for the drafting history, a review of the *travaux préparatoires* adds surprisingly little to an understanding of the content of the refugee definition, though the larger historical context provides important lessons. An approach based on the object and purpose of the refugee definition is probably the most appropriate interpretative method. The chapter proposes that, assuming a sufficiently serious threat to life, bodily integrity or liberty, application of the refugee definition should centre around principles of non-discrimination, condemnation of collective guilt and protection of freedom of

footnote 5 (*cont.*)

Harvard International Law Journal, 1990, p. 129; David Martin, 'The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource', in *Refugee Policy: Canada and the United States* (ed. Howard Adelman, Centre for Refugee Studies, York University, Toronto, 1991), p. 32.

⁶ Geneva Convention, article 33(1), and customary international law.

thought and expression, finding that these purposes are truest to the Convention's language and history. It then considers several other possible formulations of the refugee definition's object and purpose. Finally, some implications and limits of these principles in the application of the refugee definition are discussed.

The ordinary meaning of the refugee definition

The point of departure for interpretation of the refugee definition, in international and many domestic legal systems, is the 'ordinary' or 'plain' meaning of its terms. On the international level, this textual approach is embodied in both the jurisprudence of the International Court of Justice⁷ and in the Vienna Convention on the Law of Treaties.⁸ Article 31 of the Convention directs that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.⁹ The Vienna Convention is 'clearly based on the view that the text of a treaty must be presumed to be the authentic expression of the intentions of the parties'.¹⁰ The *travaux préparatoires* play a subsidiary role in the interpretative process.¹¹ The drafting history thus may be resorted to only to 'confirm' the ordinary meaning of the text, or when the textual approach leaves the meaning 'ambiguous or obscure' or leads to a patently absurd or unreasonable result.¹²

Although the Geneva Convention provides for disputes relating to its interpretation or application to be referred to the International Court of Justice (ICJ) at the request of any state party to the dispute, this mechanism has never been invoked. The ICJ thus has never had occasion to construe any portion of the Convention. In their domestic application of the Convention, states party have employed the textual approach in varying degrees. On the other hand the Office of the United Nations High Commissioner for Refugees (UNHCR), with which states are obliged to co-operate,¹³ has adopted a less literal approach in its *Handbook*.¹⁴

⁷ Ian Brownlie, *Principles of Public International Law* (5th edn, Oxford University Press, 1998), p. 632.

⁸ UN Doc. A/Conf. 39/27, concluded at Vienna on 23 May 1969, 1155 UNTS 331, entered into force 27 January 1990 (hereinafter the Vienna Convention).

⁹ Vienna Convention, article 31(1). Rather than connoting a wide range of background, practice or history, 'context' under the Vienna Convention means merely the text, preamble, annexes and related instruments. Vienna Convention, article 31(2).

¹⁰ Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984), p. 115. ¹¹ Sinclair, *Law of Treaties*, p. 141.

¹² Vienna Convention, article 32. ¹³ Geneva Convention, article 35.

¹⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, revised 1992).

There is insufficient space here to make more than a few remarks about the limits of the so-called ‘ordinary meaning’ or ‘plain meaning’ approach to the Convention. In the United States, the Supreme Court has had four occasions to interpret the Convention, all of which ostensibly have employed the textual method. In my opinion, two of those cases have reached incorrectly narrow results, one egregiously so. In *Immigration and Naturalization Service v. Stevic*,¹⁵ the Supreme Court concluded that a person who establishes a well-founded fear of persecution may (at least in theory) be returned to a country of persecution unless he or she can establish that persecution is more probable than not. The Supreme Court reached this result by considering the language of article 33 and its domestic law analogue¹⁶ in total isolation both from the other provisions of the Convention and from its history and purpose. The other case, *Sale v. Haitian Centers Council, Inc.*,¹⁷ also purported to use the plain meaning of the Convention. In reality it distorted that meaning to reach the tragic – and in my opinion, totally incorrect – conclusion that the maritime interdiction and the return of Haitian asylum seekers did not offend the basic *non-refoulement* guarantee of the Convention.¹⁸

In a third case, *Immigration and Naturalization Service v. Elias-Zacarias*,¹⁹ the Supreme Court decided that a refugee claimant must produce at least ‘some evidence’ that the feared harm is ‘for reasons of’ one of the five specified grounds. This result has been heavily criticised,²⁰ but I believe some connection between ‘persecution’ and the reason for it to be supported, if not compelled, by the text of the definition. In addition to the cases in which ‘ordinary meaning’ has produced unduly restrictive interpretations, there have been some cases in which it has also led to results that can hardly be said to have been contemplated by the Convention’s drafters. Examples would include giving refugee status to

¹⁵ 467 US 407 (1989). ¹⁶ Refugee Act of 1980, Pub.L. No. 96–212.

¹⁷ 509 US 155 (1993).

¹⁸ Indeed the Inter-American Human Rights Commission ruled in October 1996 that these US interdiction policies violated articles of the American Convention on Human Rights as well as the prohibition of *refoulement* set out in article 33 of the Geneva Convention. Inter-American Human Rights Commission, *Haitian Refugee Cases*, Case No. 10.675, Inter-Am CHR OEA/Ser/L/V/II.93, Doc. 36 (17 October 1996); revised and adopted as a final report on 13 March 1997, see 5 IHRR, 1998, pp. 120–65.

¹⁹ 502 US 478 (1992). The fourth case was *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 US 421 (1986) concerning the meaning of ‘well-founded fear of persecution’.

²⁰ Deborah Anker *et al.*, ‘The Supreme Court’s Decision in *Immigration and Naturalization Service v. Elias-Zacarias*: Is There Any “There” in There?’, 69 *Interpreter Releases*, 1992, p. 285 at p. 286; Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’, 9 *Harvard Human Rights Journal*, 1996, p. 229 at p. 237; and Karen Musalo, ‘Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms’, 15 *Michigan Journal of International Law*, 1994, p. 1179.

victims of harms directed particularly at women, such as genital mutilation, who, while arguably falling within the term ‘membership of a particular social group’ were almost certainly outside the scope of the refugee definition as originally conceived.²¹

In short, the text of the refugee definition constitutes what might be described as the boundary of its application. Within those limits textual analysis can only take us so far towards a workable interpretation of the refugee definition. Quite apart from the question of whether the plain meaning is true to either the intentions of the drafters or the values they sought to serve, such textual analysis is simply inadequate to respond to the myriad circumstances that bring asylum seekers to invoke refugee status. For practical reasons alone, we must look elsewhere for guidance.

Significance of the *travaux préparatoires*

According to the Vienna Convention on the Law of Treaties, the *travaux préparatoires* of a treaty are a subsidiary tool of interpretation, used only to ‘confirm’ the ordinary meaning or if a term is ‘ambiguous or obscure’. What do the *travaux préparatoires* of the Geneva Convention and its Protocol tell us about persecution and the reasons for it? First, there is no definitive treatment in the drafting process of either ‘persecution’, ‘race’, ‘religion’, ‘nationality’, ‘membership of a particular social group’ or ‘political opinion’, or of the connection between those grounds and the feared persecution implied by the term ‘for reasons of’. While the deliberations were heavily weighted toward consideration and establishment of the refugee definition, they rarely reached any level of specificity concerning its terms, despite several observations about the need for clarity in the description of those to whom the Convention would apply. Instead, other more structural issues occupied the attention of the participants: whether to enumerate categories or describe criteria; what temporal and geographic restrictions, if any, to impose; and which other potentially eligible groups should be barred.

However, the drafters were, at all stages, concerned about the content of the definition, including the non-categorical bases for refugee status. They repeatedly emphasised the need for clarity regarding the scope of the Convention’s coverage. They rejected more general terms for the definition in favour of a well-founded fear of being persecuted for reasons of race, religion, nationality and political opinion. Although it was accomplished with very little discussion or elaboration, the conference of plenipotentiaries added an additional ground – membership of a particular social

²¹ See p. 29 below.

group – to the prohibited reasons for persecution, an amendment which suggests that the former grounds were not thought to be all-encompassing.

The end result is that the words ‘persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion’ mean something other than some unspecified illegitimate governmental action. Indeed, the focus on the terms of the Convention definition of ‘refugee’ and, particularly, the fact that the enumerated reasons for persecution were supplemented by the conference of plenipotentiaries, supports the argument that the conference representatives may have regarded the original grounds as being restricted to something like their literal meaning. In short, much of the evidence from the drafting process is consistent with the conclusion that the phrase ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ was believed to add meaning to, or indeed to qualify, the concept of ‘persecution’.

In its final form, the Convention encompassed persons who had fled, or might flee, as a result of events that had already taken place.²² While the precise number of refugees who would eventually present themselves to states party was unknown, the nature, and indeed the circumstances, of the precipitating events were matters of historical record.²³ The drafters thus must have had in mind the groups of refugees to which the Convention alluded in its general definitional language.

The primary events influencing the Convention’s drafters were, of course, the Nazi persecutions of 1933–45.²⁴ The Convention’s inclusion of persecution for reasons of race, religion and nationality speaks most directly to that experience. The treatment of Jews for reasons of their religion and perceived ‘race’ was the paradigm condition the drafters meant to encompass.²⁵ In addition, while the period before and during the Second World War had certainly seen its share of persecution of individuals, the immediate post-war period prior to the conference witnessed a new wave, consisting mostly of those in flight from increasingly repressive communist regimes in central and eastern Europe.²⁶ These refugees,

²² Guy S. Goodwin-Gill, ‘Refugees: The Functions and Limits of the Existing Protection System’, in *Human Rights and the Protection of Refugees under International Law* (ed. Alan E. Nash, Canadian Human Rights Foundation, Quebec, 1988), p. 165.

²³ In that sense the drafters had avoided creating the ‘blank cheque’ which was at the head of the parade of unacceptable scenarios advanced by states which participated in the Convention’s formulation.

²⁴ Jack Garvey, ‘Toward a Reformulation of International Refugee Law’, 26 *Harvard Journal of International Law*, 1985, p. 483.

²⁵ *Sale v. Haitian Centers Council, Inc.*, 509 US 155 (1993), at 207 (‘The Convention . . . was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II’) (Blackmun J dissenting).

²⁶ Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* (Oxford

and other groups of similarly displaced persons who refused to repatriate on the basis of feared political persecution, also were clearly of concern to the drafters of the Convention. As with other post-war international legislation, its authors were to a great extent legislating about past events.

There is very little in the events of the Second World War and its immediate aftermath to override the language used in the Convention restricting refugee status to those with a well-founded fear of persecution on one of the five specified grounds. That is, the refugees of the era were those who had been harmed because of their personal characteristics (race, religion, nationality) or because of their beliefs (religion or political opinion) or social class (social group). These post-war refugees included those who had not yet been targeted but who might be, as well as those who simply objected on political grounds to the new central and eastern European governments, fleeing from conditions they found intolerable. There is no indication in the *travaux préparatoires* or the historical conditions of the period that the Convention was designed to cover other forms of social suffering existing in Europe or elsewhere.

Purposes of the refugee definition

For a number of reasons, interpretation of the refugee definition needs to look to the Convention and Protocol's object and purpose. One is that the text cannot otherwise be fully understood, as the Vienna Convention recognises and as case law illustrates. Secondly, an exclusively textual interpretation may undermine the important normative concerns embodied in the refugee definition. Thirdly, the Convention refugee definition is both a product and a part of the history of the twentieth century, and an excessively literal textual approach runs the risk of ignoring that history.

As noted above, the Vienna Convention directs that a treaty be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and 'in light of its object and purpose'.²⁷ Although the 'ordinary meaning' is the primary source of a treaty's meaning, 'every text, however clear on its face, requires to be scrutinised in its context and in light of the object and purpose which it is designed to serve'.²⁸ As Brownlie states: 'A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole and in light of its objects and purposes.'²⁹ Therefore, while 'the initial search is for the "ordinary meaning" to be given to the

University Press, Oxford, 1985), pp. 348–54; Jacques Vernant, *The Refugee in the Post-War World* (Yale University Press, New Haven, 1953), pp. 66–7, 70, 74–5 and 79.

²⁷ See p. 15 above. ²⁸ Sinclair, *Law of Treaties*, p. 116.

²⁹ Brownlie, *Public International Law*, p. 634.

terms of the treaty in their “context”; it is *in light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified³⁰. This is especially so when the textual approach leaves the decision-maker with a choice of possible meanings.

The basic source for discerning the object and purpose of a treaty is its preamble and text.³¹ These may be understood in light of the prior relations and agreements between the parties,³² but the object and purpose must be grounded in the terms of the treaty itself. This limitation may be contrasted with a ‘teleological approach’, which, after discovering the treaty’s overall purpose, may use this purpose to infer results unsupported by the text.³³ The teleological approach is rejected by the Vienna Convention, which, as noted above, employs the treaty’s object and purpose only as a means of explicating the text.

Protection of the innocent

This section proposes that interpretation of the refugee definition centres around three related purposes which can be inferred from its text, history and context. One such purpose is protection against serious harm inflicted for reasons of personal status – what might be called ‘the persecution of difference’. This principle serves a second, related, purpose: protection from measures based upon the attribution of collective guilt. The third purpose of the refugee definition is the privileging of individual belief and expression. These purposes are not unrelated, and the discussion which follows will address some of their connections. One common thread is that the persecution of either difference or belief may be seen as harm to persons who are innocent of any wrongdoing.

Traditionally, some societies have conceived of both personal status and/or political expression as bases for criminal sanctions or other less formal punishments. The Geneva Convention and many other post-war international instruments, however, firmly reject both as grounds for the imposition of punishment or other harm. The aims of the refugee definition concern the two great paradigms of the post-war period: the rights of non-discrimination and free expression. They thereby serve to safeguard two essential attributes of the human personality, at least for

³⁰ Sinclair, *Law of Treaties*, p. 130.

³¹ Francis G. Jacobs, ‘Varieties of Approach to Treaty Interpretation’, 18 *International and Comparative Law Quarterly*, 1969, p. 318; *Case Concerning Rights of Nationals of the United States of America in Morocco (US Nationals v. Morocco)*, ICJ Reports, 1952, p. 196.

³² *US Nationals v. Morocco*, *ibid.*

³³ See, e.g., Sinclair, *Law of Treaties*, pp. 130–4; Jacobs, ‘Treaty Interpretation’, pp. 323–5.

those, who as Patricia Tuitt points out, can physically reach a place to invoke refugee protection.³⁴

The next three subsections will pursue these themes in greater detail, while the last section will consider other possible formulations of the purposes of the refugee definition.

The persecution of difference

The core concept of the refugee definition is protection against the infliction of harm on the basis of differences in personal status or characteristics. This idea is implicit in the very notion of 'persecution' and is made explicit by the linking of 'persecution' with the first four of the five cognisable grounds: race, nationality, religion and social group membership. Race, religion, nationality and social group membership are primarily – if not exclusively – matters of status, as opposed to individual action. Refugee law says, in effect, that harm cannot legitimately be premised on an individual's personal characteristics or status. That is the clear message of the text, supported by its background. By implication, refugee law only contemplates the imposition of punishment on the basis of an individual's wrongful acts.

Persecution for reasons of personal characteristics or status fits squarely within what is probably the most prevalent theme of post-1945 human rights law: non-discrimination. Others have reviewed the growth and development of this principle in international legislation,³⁵ so I will not do so here. Their findings may be summed up in the following terms:

Mere inspection of the basic international human rights documents demonstrates that racial, sexual, and religious discrimination are, certainly in terms of attention paid on the face of the agreements, the overarching human rights concern of the international community . . . [T]he UN charter, the Universal Declaration, the international covenants, and the various conventions devote more attention to preventing discrimination than to any other single category of human rights.³⁶

Interestingly, neither of the cited sources summarising the relevant international documents on non-discrimination mentions the Geneva Convention and Protocol. Strictly speaking, of course, these two instruments do not create new non-discrimination rights, but they do embody

³⁴ See chapter 5 of this volume.

³⁵ See, e.g., Warwick McKean, *Equality and Discrimination under International Law* (Clarendon Press, Oxford, 1983); and Jack Greenberg, 'Race, Sex and Religious Discrimination in International Law' in *Human Rights in International Law*, (ed. Theodor Meron, Clarendon Press, Oxford, 1984), vol. II, p. 307.

³⁶ Greenberg, 'Religious Discrimination', p. 309.

protection from the practices condemned directly in much other international legislation. In that sense they are part and parcel of the central post-war human rights concern. Indeed, the Convention protection from racial, religious, national or social group *persecution* may be seen to fit in the middle of a continuum between *discrimination* and *genocide*. Persecution is generally thought of as an especially severe form of discrimination, but as less serious than genocide, which entails the attempted destruction of a whole people or group.³⁷

Like other mid-century international law, these developments are a direct response to the Second World War and its surrounding era. They also mark a coming of age of what might be called the ‘anti-caste principle’: the idea that some people must not be treated arbitrarily as second-class citizens. Cass Sunstein has described the justification for this principle as follows:

The motivating idea behind an anticaste principle is, broadly speaking, Rawlsian in character. It holds that without very good reasons, social and legal structures ought not to turn morally-irrelevant differences into social disadvantages, and certainly not if the disadvantage is systemic. A difference is morally irrelevant if it has no relationship to individual entitlement or desert. Race and sex are certainly morally irrelevant characteristics in this sense; the bare fact of skin color or gender does not entitle one to social superiority.³⁸

Similarly, a 1949 United Nations report described discrimination as ‘any conduct based on a distinction made on grounds of natural or social categories, which have no relation either to individual capacities or merits, or to the concrete behaviour of the individual person’.³⁹

As with race and gender, religion, nationality and social group membership are also regarded as morally irrelevant, at least as bases for the severe conditions that persecution entails. That is, while religion, nationality and social group membership may be the basis for social and other minor distinctions, they are not valid grounds for physical harm, death or imprisonment. These are basic axioms of post-1945 moral, legal and political thought. Historically, however, recognition of the non-discrimination principle was not always the norm, as Warwick McKean succinctly explains:

³⁷ For a poignant illustration of these distinctions, see Toby F. Sonneman, ‘Buried in the Holocaust’, *New York Times*, 2 May 1992, p. 23 (complaining that the US Holocaust Memorial Council ‘refers to the Romany ordeal as persecution, while the Jewish experience is treated as attempted racial extermination’).

³⁸ Cass R. Sunstein, ‘Words, Conduct, Caste’, 60 *University of Chicago Law Review*, 1993, p. 795 at p. 800.

³⁹ United Nations, *The Main Types and Causes of Discrimination*, UN Doc. E/CN. 4/Sub. 2/40 Rev. 19, 1949, p. 9.

One of the most constant themes underlying the great historical struggles for social justice has been the demand for equality. Maine pointed out that ancient law was largely a jurisprudence of personal inequalities in which every individual possessed a status imposed upon him independently of his own will and as a result of circumstances beyond his control, so that his legal position depended on whether he was a freeman or a slave, a noble or a commoner, a native or a foreigner, male or female. Most differences in status were 'natural inequalities' in that they depended upon birth or other unalterable circumstances. A status was the condition of belonging to a class to which the law assigned certain legal capacities or incapacities.⁴⁰

The refugee definition is an integral part of this movement toward equality and away from status, a development which, of course, is not yet complete as a matter of practice.

Collective guilt

Viewed from a different perspective, the refugee definition provides protection from the imposition of collective guilt and punishment, from the infliction of harm on individuals for real or suspected wrongs by others of similar background or otherwise associated with the victims. Much 'persecution' is the result of retaliation for alleged 'crimes' by other persons of the victims' racial, religious, national or social group. Such reprisals can result from grievances which have been felt over many years – or even centuries. Almost every instance of civil strife in the twentieth century has been motivated and/or accompanied by attributions of collective guilt. Moreover, collective attack by one side often begets collective retaliation by the other. The problem is compounded in civil wars, where military strikes by one side often trigger reprisals against civilians believed to be associated with the enemy combatants. When the dividing lines in a civil war correspond to ethnic divisions, the attacks are even more likely to be directed indiscriminately at members of the other side's ethnic group, whether combatants or not.

International law in the post-1945 era has rightly condemned attributions of group guilt, collective punishment and attacks on civilians. It has insisted instead that punishment be imposed on the basis of individual responsibility assessed in formal judicial proceedings. Condemnation of collective punishment has been expressed most directly in international humanitarian law. Article 33 of the Fourth Geneva Convention, for example, states:

⁴⁰ McKean, *Equality and Discrimination*, p. 1.

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.⁴¹

Reprisals against protected persons and their property are likewise prohibited. Prohibition of attacks on civilians and others not participating in hostilities – one of the most fundamental principles of humanitarian law – expresses the same sentiment: the avoidance of harm to civilians as a group in response to action by their armed forces.

Condemnation of collective guilt and the insistence on formal findings of guilt, individually determined, are implicit in basic international human rights law as well. Thus, everyone has the right of life, liberty and security of person,⁴² the right to recognition before the law,⁴³ and the right to be free of arbitrary arrest, detention or execution.⁴⁴ Moreover, everyone has the right to a judicial determination of ‘his rights and obligations and any criminal charge against him’.⁴⁵ This means that ‘[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’.⁴⁶ All of these rights assume – and help ensure – that loss of life or liberty will be premised only on individual wrongdoing. Collective responsibility and punishment, especially when imposed summarily, are antithetical to the foregoing human rights guarantees. In recent years the connection between legality and punishment has been made explicit. Thus, Protocol II to the Geneva Conventions declares that ‘[n]o sentence shall be executed on a person found guilty of an offence’ except after a fair trial, and ‘no one shall be convicted of an offence except on the basis of individual penal responsibility’.⁴⁷

⁴¹ Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. See also Protocol I, article 75(2)(d) (collective punishment of persons in the power of a party to a conflict prohibited, whether committed by civilian or military agents) and Protocol II, article 4(2)(b) (collective punishments of persons not, or no longer, taking part in hostilities), Protocols Additional to the Geneva Conventions of 12 August 1949, 8 June 1977, 1125 UNTS 3 and 1125 UNTS 609. International Law Commission (43rd Session), *Draft Report of the International Law Commission on the Work of its Forty-Third Session*, 15 July 1991, UN Doc. A/CN.4/LA64, Annex A, article 22(2) (including collective punishment among exceptionally serious war crimes); United Nations Sub-Commission on Protection of Minorities, *Draft Declaration on Minimum Humanitarian Standards*, article 3(2)(b), Resolution 1994/126 (prohibiting collective punishments against persons and their property).

⁴² Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) (10 December 1948) (hereinafter UDHR), article 3.

⁴³ UDHR, article 6, International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI) (16 December 1966), entered into force 23 March 1976 (hereinafter ICCPR), article 16. ⁴⁴ UDHR, article 9; ICCPR, articles 6 and 9.

⁴⁵ UDHR, article 10. ⁴⁶ ICCPR, article 9(1).

⁴⁷ Protocol II, articles 6(2) and 2(b). See also *Minimum Humanitarian Standards*, articles 9 and 9(b).

Attribution of group guilt, and measures based upon that premise, are thus condemned in humanitarian and human rights law. The same sentiments animate refugee law and the Convention refugee definition, the formative stages of which coincided almost exactly with the drafting of the Universal Declaration of Human Rights and the Geneva Conventions of 1949. Indeed, given the relative infrequency with which violations of international humanitarian and human rights law result in meaningful sanctions, refugee law may currently provide the international legal regime's most effective remedy for collective punishment. Its history and language, along with contemporaneous developments in international human rights protection, clearly evince a purpose to provide protection for victims of this kind of group-based harm.

Political opinion and expression

Protection from persecution for reasons of political opinion can be seen to serve two separate but related purposes. One is that persecution for this reason stands in the same position as persecution for reason of race, religion, nationality or social group membership: it is an irrelevant criterion for the infliction of harm. In that sense political opinion is most analogous to religious opinion. Implicit in this approach is the assumption that political opinion *per se* is not a sufficient indicator of seditious or other punishable behaviour to warrant a pre-emptive strike by the authorities, in contrast, for example, to conspiracy, attempted anti-government activity, or even advocacy of such activity. Political opinion is treated as too inchoate a threat to subject its holder to governmental sanctions. Like the other aspects of personal status – or, in the case of religion, belief – it is thus morally irrelevant to the infliction of harm. This justification explains why wrongly imputed political opinion falls within the refugee definition. Persecution for reason of a political opinion the victim does not hold, but is incorrectly believed to hold, does not protect the victim's free conscience or expression rights because, in this situation, the victim does not have the imputed political opinion. What justifies refugee protection is that the assumed political opinion which is attributed to the victim by the persecutors is an irrelevant ground for punishment, whether the persecutor is correct or not.

Protection against persecution premised on the victim's political opinion can be seen to serve an additional purpose: enhancement of the individual's freedom of conscience and expression in his or her homeland. Affirmative recognition of these rights can be found elsewhere in 'the network of international conventions and declarations governing freedom

of opinion and expression'.⁴⁸ For instance, article 19 of the Universal Declaration of Human Rights states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Refugee status 'for reasons of' political opinion has come to include behaviour that is, at the least, co-extensive with the rights contained in article 19. Thus, persecution for reasons of political *opinion* also includes persecution for reasons of political *expression*.⁴⁹ The entire concept represents a privileging of a particular human right – freedom of conscience and expression – just as the other elements of the refugee definition embody a form of the anti-discrimination principle.

The main explanation for this preference for free expression and non-discrimination is probably historical. As discussed above, the drafters were responding to recent known events.⁵⁰ With respect to persecution for reasons of political opinion, they knew only too well that the totalitarian regimes from which refugees had fled before, during and after the Second World War tolerated no dissent. Severe persecution for reasons of 'political opinion', even unexpressed opinion, was a hallmark of these regimes.

Free speech is, of course, antithetical to dictatorship, and in providing sanctuary to those who voiced their opposition the drafters of the Convention were, to some degree, aiming to undermine the oppressors' authority. While free speech does not ensure democracy, it is a necessary precondition. In a limited way, then, the Convention serves the purpose of encouraging and facilitating the larger project of democracy. This, in turn, may eventually diminish the flow of refugees, as free speech and democracy reduce the incidence of persecution in the country of origin.

More problematic is the question of whether the refugee definition also covers action (as opposed to expression) motivated by political aims. In other words, do governmental responses to acts which violate laws of general application constitute persecution? This subject has generated more case law and scholarly commentary than can be reviewed here.⁵¹ Examples of politically motivated acts include conscientious refusal to serve in a government's armed forces, emigration which violates laws

⁴⁸ Richard Plender, *International Migration Law* (2nd edn, Martinus Nijhoff, Dordrecht, 1988), p. 423.

⁴⁹ Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996), p. 49. ⁵⁰ See p. 18 above.

⁵¹ See, e.g., Goodwin-Gill, *The Refugee in International Law*, pp. 52–66; James C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), pp. 152–7 and 169–85; *Rodriguez-Roman v. Immigration and Naturalization Service*, 98 F. 3d 416 (9th Cir. 1996).

against unlawful departure, and armed resistance to an undemocratic government.

Other possible purposes

This section describes two other views of the purposes of the refugee definition and their implications, along with a critical analysis of these approaches.

Politically motivated opposition to oppressive regimes

It has been argued that the purpose of the Convention and its refugee definition is to provide shelter for those who are politically opposed – in thought, word or deed – to oppressive regimes in their country of origin. In his treatise, *The Status of Refugees in International Law*, Grahl-Madsen contends that the historical origins of the refugee definition justify affording refugee status to those who violate the laws of general application of oppressive regimes, particularly where those laws are part of its oppressive apparatus.⁵² For Grahl-Madsen ‘active resistance, evasion of military duties, unauthorised departure or absence from the home country’ may qualify the person for refugee status if the offence is ‘in some way a reflection of his true, alleged or implied political opinion’.⁵³

The words persecution ‘for reason of political opinion’ may be read so as to imply that the Convention is designed to meet the needs of persons fleeing from a country where people are persecuted because of their beliefs, where opposition is not tolerated. The fact that anyone has taken up resistance or committed other acts for political motives against an oppressive government and thereby become liable to sanctions, shall not disqualify him from gaining refugee status. It is our assertion that this is, in a nutshell, the meaning of the provision just discussed.⁵⁴

The UNHCR *Handbook* adopts a modified version of this position, and to some degree it parallels that taken by some courts.⁵⁵

Grahl-Madsen grounds his conclusions in the Convention (rather than in the *Handbook*, which post-dates his treatise) or free-floating conceptions of wise policy. In the main, his argument extrapolates from pre-Convention history. During the Second World War, the Supreme Headquarters, Allied Expeditionary Force (SHAEF) expressly sheltered persons who were persecuted ‘because of their activities in favour of the

⁵² Atle Grahl-Madsen, *The Status of Refugees in International Law* (A. W. Sijthoff, Leyden, 1966), vol. I, pp. 220–5.

⁵³ In this connection, he contends: ‘The struggle for a certain political conviction is not to be regarded as a fault but as a right founded in the law of Nature’. Grahl-Madsen, *Status of Refugees*, p. 232. ⁵⁴ *Ibid.*, p. 253. ⁵⁵ See UNHCR, *Handbook*, paras. 80–6.

United Nations', that is, the Allies.⁵⁶ In practice, this policy continued in the post-war period with respect to refugees from the Soviet Union and other countries in the Soviet bloc under the terms not of a special ideological exemption as in the SHAEF Memorandum quoted above, but of the political opinion language of the Convention itself. After acknowledging that the interpretation most in keeping with the wording of article 1A(2) of the Convention would require that the political opinion of the person in question be 'decisive' for the nature and severity of the punishment for a politically motivated act,⁵⁷ Grahl-Madsen continues:

However, the Refugee Convention does not exist *in vacuo*. It is a link in a historical development, and there is a direct line from Paragraph 32 of SHAEF Administrative Memorandum Number 39, *via* Part I, section C, paragraph I, of the Annex I to the IRO [International Refugee Organisation] Constitution, to Article I A(2) of the Refugee Convention, and those who profess the liberal doctrine, according to which a person expecting punishment for a politically motivated act may benefit from the Convention, are consciously or subconsciously aware of this historical relationship. The French Commission des Recours and the German Bundesverwaltungsgericht both adhere to the latter doctrine, and even if their decisions should be based on instinct rather than a linguistic analysis of the text of the Convention, we think they rest on solid ground.⁵⁸

This historically grounded interpretative move potentially brings within the definition's coverage politically motivated conduct such as unauthorised departure, conscientious objection to military service, or acts of resistance. Coupling this approach with reliance on evolving human rights norms, others have also argued for the inclusion of these acts within the refugee concept.⁵⁹

While an approach based in the history of the Convention may cover those whom a textual method of interpretation would omit, it may also exclude others who arguably fall within the literal terms of the refugee definition. For example, potential victims of female genital mutilation (FGM) may qualify as victims of social group persecution, with the relevant social group being young women of a tribe practising FGM who have not yet been subjected to it.⁶⁰ It is hard to justify the application of the refugee definition to this practice or other gender-based harms on the basis of the historical background of the Convention, however. There is

⁵⁶ SHAEF Administrative Memorandum No. 19, quoted in Grahl-Madsen, *Status of Refugees*, p. 228, where he writes: 'The Allied military authorities thus came to the aid of persons who, viewed from the "other side of the hill", were guilty of political (or military) offences (treason).' ⁵⁷ Grahl-Madsen, *Status of Refugees*, pp. 220 and 238–40.

⁵⁸ *Ibid.*, p. 249 (citations omitted).

⁵⁹ See, e.g., Goodwin-Gill, *The Refugee in International Law*, pp. 49–66.

⁶⁰ See *Re Kasinga*, A 73476–695 (BIA 1996), 35 ILM 1998, p. 1145, especially concurring opinion of Board Member Filuppu.

no evidence that the drafters or practitioners of refugee law in the post-war period intended to encompass known, traditional gender-based inequalities, however severe. The incremental trend towards defining women as a social group (of which the FGM issue is only part) was most likely not contemplated by the drafters of the Convention. Indeed, if history is to be the guide then the whole concept of 'social group' persecution in general probably ought not be extended much beyond the sense of 'social class'.⁶¹

Furthermore, as Grahl-Madsen forthrightly recognised, interpretations premised in the events of the Second World War era may conflict with the literal terms of the refugee definition. Some have attempted to circumvent this problem by contending that the drafters were speaking and writing in a kind of code in order to avoid undue offence to the nations whose citizens in a sense were the true objects of their concern.⁶² That is, the Western states which authored the Convention definition constructed a refugee protection system 'consistent with their own desire to give international legitimacy to their efforts to shelter self-exiles from the socialist states'.⁶³ In this view, its terms were a cover for an ideologically based attempt to embarrass communist regimes. Under the protection of the new Convention, the Western countries often treated flight from communism, without further evidence, as sufficient to establish well-founded fear of persecution.⁶⁴ Practice at the time then becomes the key to unlocking the code, but it may produce some murky answers as the debate shifts to examine just what behaviour, by persecuting states or by victims, this code is meant to reflect. This approach requires that objects and purposes be inferred, not from the language of the refugee definition, but from its history, and then overriding the text with that object and purpose.

Human rights protection

Several writers have argued that the refugee definition protects against violations of recognised human rights, regardless of whether the threatened harm is premised on the victim's race, nationality, religion, social group membership or political opinion.⁶⁵ Under these theories, the relevant question is whether a human rights violation will occur, and whether it will result in harm sufficiently serious to amount, 'quantitatively', to persecution. Jean-Yves Carlier's contribution to this volume, 'The Geneva Refugee Definition and the "Theory of the Three Scales"', is one example of this approach.⁶⁶

⁶¹ Plender, *International Migration Law*, p. 421.

⁶² Hathaway, 'Underlying Premises'. ⁶³ *Ibid.*, p. 151. ⁶⁴ *Ibid.*, p. 150.

⁶⁵ See pp. 30–1 below. ⁶⁶ See chapter 2 of this volume.

A human rights-based interpretation marks a shift from causes to effects as the focus of refugee law. There are, to be sure, some convincing policy reasons for doing so. A refugee standard focusing on the most basic human rights – freedom from slavery, torture, arbitrary execution or imprisonment – would ensure some sanctuary from what are regarded internationally as the most abhorrent forms of harm. It would also assure a more equal response to what are perceived as morally equivalent threats.⁶⁷ Focusing on the effects rather than the causes also serves to eliminate, in most cases, the need to enquire into the reasons for the harm.

Perhaps the most unequivocal statement of the human rights theory is that of Aleinikoff.⁶⁸ He begins with the contention that the term ‘persecution’ has a meaning separate and independent from any identifiable ground on which it is imposed. In his view, persecution is linked to the specific grounds only to connote the ‘unacceptable, unjustified, abhorrent’ or ‘intolerable’ infliction of harm.⁶⁹ In other words, the drafters used the phrase ‘for reasons of race, religion, nationality, political opinion, or membership of a particular social group’ not to qualify or define persecution but only as examples of unacceptable acts, and these examples were not meant to be exhaustive. Extracting this larger purpose from the history and language of the Convention, Aleinikoff suggests that: ‘Persecution might well be given a free-standing meaning, that requires judgments about both the degree of and justifications for the harm, but not one that necessarily invokes the five grounds as the test of the qualitative aspect.’⁷⁰ The notion that the infliction of any serious and unacceptable harm constitutes ‘persecution’ lurks in other critiques as well.⁷¹

Separating ‘persecution’ from its causes may broaden its reach, but it also raises new conceptual difficulties. In Aleinikoff’s formulation, for example, persecution is unacceptable, unjustified, abhorrent or intolerable harm, but just what circumstances reach that level of illegitimacy? The most logical source of content for a free-standing definition of persecution is international human rights law, and several commentators have suggested that persecution equates with human rights violations. One

⁶⁷ See, e.g., Andrew Shacknove, ‘Who is a Refugee?’, 95 *Ethics*, 1985, p. 274 at p. 276; Astri Suhrke, ‘Global Refugee Movements and Strategies of Response’, in *US Immigration and Refugee Policy: Global and Domestic Issues* (ed. M. Kritz, D. C. Heath and Co., 1983), pp. 159–60.

⁶⁸ T. Alexander Aleinikoff, ‘The Meaning of “Persecution” in United States Asylum Law’, 3 *International Journal of Refugee Law*, 1991, p. 5.

⁶⁹ *Ibid.*, p. 12. This he describes as the ‘qualitative’ aspect of the refugee definition.

⁷⁰ *Ibid.*, p. 13.

⁷¹ See, e.g., Donald P. Gagliardi, ‘The Inadequacy of Cognizable Grounds of Persecution as a Criterion for According Refugee Status’, 24 *Stanford Journal of International Law*, 1987, p. 259 at pp. 271–2.

potential practical difficulty with this approach is that the relatively broad range of human rights enunciated internationally would make many millions of people potential refugees in today's world.

In perhaps the most sophisticated attempt to relate persecution to human rights norms, Hathaway attempts to identify certain basic rights 'which all states are found to respect as a minimum condition of legitimacy'.⁷² He thus defines 'persecution' as the sustained systematic violation of basic human rights demonstrative of a failure of state protection.⁷³ Remediation of the failure of state protection is, in this view, the central purpose of the refugee definition and the larger refugee law regime. Hathaway's analysis derives a hierarchy of rights based upon a combination of their presence in various international human rights instruments and the degree to which derogation of the rights is permitted in emergency situations.⁷⁴ Conceptually, this catalogue of rights could serve as a working definition of the kinds of deprivation which, by themselves, constitute 'persecution' without any need to show a prohibited reason for the human rights infringement.⁷⁵ However, even this formulation demonstrates the necessity of choice among the types of harm which would satisfy a free-standing definition of persecution.⁷⁶

The question remains, though, whether the Convention definition of a refugee is meant to encompass all persons exposed to serious human rights violations. Despite their valiant efforts, neither Aleinikoff, Hathaway nor other writers provide a convincing fit between their proposed purposes and the text of the definition. Rather, to one degree or another, they attempt to extract a purpose from the language and then subordinate the language to the discovered purpose, a process which finds little support in accepted methods of treaty and statutory interpretation.⁷⁷

Furthermore, the theory that the refugee definition incorporates all serious human rights violations must address the fact that the definition makes no mention of many human rights that, at the time of its drafting, had just been enunciated in the 1948 Universal Declaration of Human Rights (UDHR). These include the right to life, liberty and security of

⁷² Hathaway, *The Law of Refugee Status*, p. 106. ⁷³ *Ibid.*, p. 112.

⁷⁴ *Ibid.*, pp. 106–12.

⁷⁵ Hathaway does not contend that this is the case under the refugee definition as written. While describing the use of civil and political categories as perhaps 'unduly anchored in a particular era', he stops short of recommending the abandonment of the linkage of such civil or political status with 'persecution'. *Ibid.*, pp. 137–9.

⁷⁶ In addition to this question of policy preference, there is a related issue of which institution (executive, administrative, legislative or judicial) would be given the role of filling in the content of such a definition.

⁷⁷ See, e.g., Sinclair, *Law of Treaties*, pp. 118 and 130–1.

person; freedom from slavery; freedom from torture and other cruel, inhuman or degrading punishment; rights of equal access to the courts; freedom of movement and departure; the right of property ownership; rights to work and leisure; rights of democratic participation; and others.⁷⁸ Instead, the preamble of the Convention simply refers to the United Nations Charter and the UDHR as affirming ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’,⁷⁹ and the bulk of the Convention is aimed at putting recognised refugees on a more (but not totally) equal footing with host country nationals.⁸⁰ The human rights embodied in the refugee definition itself centre around non-discrimination and freedom of thought and expression. That said, violation of many of the UDHR’s provisions can constitute persecution if inflicted for discriminatory or political opinion reasons, but that is a significant qualification.

If the drafters intended to cover the imposition of serious harms in the absence of such reasons, why did they not say so? Certainly the existence and importance of the UDHR were well known to the parties responsible for drafting the Convention. The *Ad Hoc* Committee on Statelessness and Related Problems, whose work initiated the drafting process, began its deliberations a little more than a year after the adoption of the UDHR. In this context it is hard to conclude either that the particular wording of the refugee definition was meant only to be illustrative, or, even further, that despite its specific language and the omission of then recently announced international human rights it nevertheless intended to encompass them.

On at least one occasion the international community has by treaty explicitly expanded *non-refoulement* to human rights violations unrelated to persecution. That instrument is the United Nations Convention Against Torture, which was opened for signature in 1984 and entered into force in 1987.⁸¹ It is now ratified by 112 states. The main thrust of the Convention is to outlaw and prevent acts of torture. Article 3(1) sets out a right to *non-refoulement* for those threatened with torture if returned. It states: ‘No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he

⁷⁸ UDHR, articles 3–10, 13–14, 17, 21 and 23–4.

⁷⁹ UDHR, preamble, para. 1.

⁸⁰ Thus, if the preamble’s reference to the UDHR has any significance at all, it is most likely the implication that recognised refugees should receive treatment that is more equal to that afforded the host country’s nationals.

⁸¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Res. 39/46, 39 UN GAOR, Annex, Supplement No. 51, at 197, UN Doc. A/39/51 (1984).